ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 31, 2004

Mr. Thomas E. Myers
Brackett & Ellis
100 Main Street
Fort Worth, Texas 76102-3090

OR2004-2590

Dear Mr. Myers:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 198507.

The Keller Independent School District (the "district"), which you represent, received a request for two categories of information regarding the investigation, negotiations and final settlement agreement between a named individual and the district. The requestor notes that redacted information that protects confidentiality is acceptable. You state that the second category of information, a copy of the final settlement agreement between the named individual and the district, is being released to the requestor. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552107, 552.111, and 552.135 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that most of the information you have submitted to us for review in Exhibits B and C is the identical information that was the subject of a previous ruling from this office. In Open Records Letter No. 2004-1953 (2004), we reviewed a request that the

[1] Although you claim that the remaining requested information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the attorney-client privilege, we note that the appropriate exception to disclosure to assert when claiming that information requested of a governmental body is protected under the attorney-client privilege is section 552.107(1) of the Government Code. Open Records Decision No. 676 at 2-3 (2002).

district received regarding a specified investigation and retirement agreement relating to a named individual. Because the facts and circumstances surrounding our previous ruling do not appear to have changed, to the extent that the present request seeks information on which we have previously ruled, you must comply with our prior ruling in regards to this information. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria for previous determination regarding cases when requested information is precisely the same information as was addressed in prior attorney general ruling).

We must now address the procedural requirements of section 552.301 of the Government Code in regards to a portion of the submitted information in Exhibit B upon which this office did not previously rule. Section 552.301(e) provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e).

Upon review of the submitted information, we note that a portion of the submitted information in Exhibit B was responsive to the initial request for this information that was subject to our previous ruling, Open Records Letter No. 2004-1953. Thus, the district was required to submit this information in response to the initial request for information by January 15, 2004. However, the district did not submit this information to us until January 23, 2004, along with this present request. Therefore, the district failed to comply with the procedural requirements of section 552.301 of the Government Code in regard to the information in Exhibit B that was not previously submitted to and ruled upon by this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). You have not shown such a compelling interest to overcome the presumption that the information at issue is public. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 630 at 4 (1994) (governmental body may waive

section 552.107(1)), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived).

However, we note that this information contains information that may be excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who timely requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is excepted from disclosure under section 552.117(a)(1) must be determined at the time the governmental body receives the request for information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the district's receipt of this request for information. The district may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the information confidential. We have marked the information that the district must withhold under section 552.117(a)(1) if the person to whom the marked information pertains is a current or former employee who timely elected under section 552.024 to keep the information confidential. The district must release the remaining information in Exhibit B that was not previously ruled on in Open Records Letter No. 2004-1953.

We now address your arguments for the remaining submitted information. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning

it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Upon review of your representations and the information at issue, we agree that most of the information in Exhibit D is protected by the attorney-client privilege and may be withheld under section 552.107 of the Government Code. However, it is not clear to this office that the remaining information in Exhibit D, which we have marked, consists of communications between or among clients, client representatives, lawyers, or lawyer representatives. Therefore, the district may not withhold this information under section 552.107(1). *See* Open Records Decision No. 676 at 6-11 (2002) (delineating demonstration required of governmental body that claims attorney-client privilege under section 552.107(1)).

However, you assert that the remaining information in Exhibit D is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 of the Government Code provides as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> ....
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a

particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both elements of this test in order for information to be excepted from disclosure under section 552.103. *See id.*

In demonstrating that litigation is reasonably anticipated, the district must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. *See* Open Records Decision No. 518 at 5 (1989). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.[2] *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Conversely, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You state that "because it was reasonably likely that some type of action might be initiated, these documents should also be exempted from production under [section] 552.103 of the [Act]." Upon review of your arguments and the submitted information, we find that the district has failed to adequately demonstrate that it reasonably anticipated litigation with regard to this matter on the date that it received this request for information. Accordingly, we conclude that the district may not withhold any portion of the remaining submitted information in Exhibit D under section 552.103 of the Government Code.

We now address your section 552.111 claim to the remaining submitted information in Exhibit D and the submitted information in Exhibit E. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Evidence. *City of Garland v.*

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[2] In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Dallas Morning News, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
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> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

Tex. R. Civ. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. Information that meets the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Based on your representations and our review of the submitted information in Exhibit E, we find that the district objectively and subjectively anticipated litigation and that this information reveals the attorney's thought processes regarding the anticipated litigation. Thus, the submitted information in Exhibit E may be withheld under section 552.111 as attorney work product. However, we find that the remaining information in Exhibit D which we have marked is not information that was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Thus, the remaining information in Exhibit D must be released to the requestor. As our ruling on the information in Exhibit E is dispositive, we do not address your other claimed exceptions for this information.

In summary, the district must release or withhold the submitted information that is encompassed by Open Records Letter No. 2004-1953 (2004) in accordance with the prior ruling. Most of the information in Exhibit D is excepted from disclosure under

section 552.107 of the Government Code. The information in Exhibit E may be withheld under section 552.111 of the Government Code. The district must also withhold the information we have marked in Exhibit B under section 552.117(a)(1) of the Government Code if the person to whom the marked information pertains is a current or former employee who timely elected under section 552.024 to keep the information confidential. The remaining information in Exhibit B and the information we have marked in Exhibit D must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 198507

Enc. Submitted documents

c: Mr. Randall S. Hauptmann
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(w/o enclosures)